August 2003

MJI Publications Updates

Child Protective Proceedings Benchbook

Managing a Trial Under the Controlled Substances Act

Crime Victim Rights Manual

Criminal Procedure Monograph 6--Pretrial Motions (Revised Edition)

Juvenile Justice Benchbook (Revised Edition)

Sexual Assault Benchbook

Traffic Benchbook--Revised Edition, Volume 1

Traffic Benchbook--Revised Edition, Volume 2

August 2003

Update: Child Protective Proceedings Benchbook

CHAPTER 9

Pretrial Proceedings

9.12 Required Procedures for Establishing Paternity

A. Definition of "Father"

Insert the following case summary after the first bulleted item on page 9-10:

In *In re CAW,* ___ Mich ___ (2003), the Michigan Supreme Court reversed the Court of Appeals' decision* that a putative father has standing to intervene in a child protective proceeding under the Juvenile Code where the child involved has a legal father. *In re CAW* involved a married couple, Deborah Weber and Robert Rivard, and their children. In July 1998, a petition alleging abuse and neglect was filed pursuant to MCL 712A.2(b). The petition stated that Rivard was the legal father of the children but might not be the biological father of "any or all of the children." The petition also indicated that Larry Heier was the biological father of one of Weber and Rivard's children, CAW. The trial court published a notice of hearing to Heier, but he did not attend any hearings. Later Rivard and Weber indicated that Rivard was the father of all of the children. The trial court then deleted all references to Heier contained in the petition. In November 2000, Weber and Rivard's parental rights to CAW were terminated. Heier then filed a motion in the trial court seeking to intervene in the child protective proceedings. Heier alleged that he was the biological father and had standing on that basis. The lower court denied Heier's motion. *CAW, supra* at ___. The Court of Appeals reversed.

*See the *Child Protective Proceedings Benchbook* Update for December 2002 for more information on the Court of Appeals' decision in *In re CAW,* 253 Mich App 629 (2002).

The Supreme Court held that Heier did not have standing to intervene in the child protective proceedings. *Id.* at ___. The Court indicated that intervention in such a proceeding is controlled by MCR 5.921(D),* which provided, in part, that a putative father is entitled to participate only "[i]f, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4). . . ." MCR 5.903(A)(4) defined a "father" as "a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child

*MCR 5.921 was amended on May 1, 2003. See MCR 3.921(C).

born out of wedlock . . . .” MCR 5.903(A)(1) defined a “child born out of wedlock” as a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of the marriage. Because Weber and Rivard were married during the gestation period, CAW was not “born out of wedlock.” No finding had ever been made that CAW was not the issue of the marriage, and the termination of Rivard’s parental rights was not a determination that CAW was not the issue of the marriage. Therefore, the requirements of MCR 5.903 were not met, and Heier did not have standing. The Court also stated the following regarding the policy underlying the applicable rules:

> “Finally, in the Court of Appeals opinion, as well as the dissent, there is much angst about the perceived unfairness of not allowing Heier the opportunity to establish paternity. We are more comfortable with the law as currently written. There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage. See *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977). It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration.” *CAW, supra* at ___.

Justice Weaver concurred with the result of the majority’s opinion but provided different reasoning. Justice Weaver indicated that the definition of “child born out of wedlock” in MCR 5.903(A)(1) varied from the definition in the Paternity Act only in the additional provision in MCR 5.903(A)(1) that paternity could be determined “by judicial notice or otherwise.” However, the additional provision does not affect when the determination that the child is not an issue of the marriage must be made in order to permit standing. Pursuant to *Girard v Wagenmaker,* 473 Mich 231, 242-243 (1991), in order to establish paternity under the Paternity Act of a child born while the mother was legally married to another man, there must be a prior court determination that the mother’s husband is not the father. Justice Weaver stated the following:

> “The provision [in MCR 5.903] that the determination may be made by judicial notice does not affect when the determination must be made in order to permit standing. Moreover, the use of the past tense makes even clearer the fact that the determination must be made by the court before a putative father may be accorded standing in a child protective proceeding. Because Weber was married to Rivard from the time of conception to the birth of CAW, and because CAW was not ‘determined by judicial notice or otherwise to have been conceived or born during a marriage but . . . not the issue of that marriage’ pursuant to MCR 5.903(A)(1), the provisions for notice to a putative father in MCR 5.921(D) were not applicable.” (Footnotes omitted.) *CAW, supra* at ___.

Justice Kelly wrote separately, concurring in part and dissenting in part. Justice Kelly agreed with the result reached by the majority but disagreed with the majority's reliance on MCR 5.921(D) and the policy underlying the Paternity Act. Justice Kelly indicated that MCR 5.921 does not explicitly address standing to intervene: it designates the persons who must be given notice before a child protective proceeding can go forward. MCR 5.901, which prescribes the court rules that apply to child protective proceedings, does not include a rule that permits intervention in a child protective proceeding. Therefore, Justice Kelly would hold that Mr. Heier could not identify a court rule under which he could intervene and, as a consequence, the trial court was required to deny his motion. *CAW, supra* at ___.

In regards to public policy, Justice Kelly stated the following:

> "I do not agree that the presumption of legitimacy rule has persuasive force in this case. Certainly, the majority would not advance the argument that this rule protects the sanctity of CAW's family unit. That proposition is absurd in the context of termination proceedings, the object of which is to destroy any familial bond between a child and the parent whose rights are being terminated.
>
> Similarly, the policy cannot be advanced on the basis that it furthers the goals expressed in the juvenile code. Rigid application of the presumption of legitimacy would frustrate the code's preference for placing a child with his parent, if the parent is willing and able to care for him." *Id.* at ___.

Justice Kelly urged that the court rules be amended to allow a putative father the right to intervene in a child protective proceeding if he is able to raise a legitimate question about paternity. *Id*. at ___.

Dissenting, Justice Cavanagh argued that the Legislature intended to allow putative fathers an opportunity to intervene in child protective proceedings. Justice Cavanagh stated:

> "[N]othing in our statutes or court rules compels the conclusion that a putative father must first establish paternity in a separate legal proceeding. To so hold perpetuates the errors caused by the majority's position in *Girard* [*v Wagenmaker* 437 Mich 231 (1991)], while denying parents the right to develop and maintain relationships with their children." *CAW, supra* at ___.

The dissent also indicated that the courts making paternity and custody determinations have the authority to inquire about a child's putative father or parent in fact in order to ensure a child's best interests and due process rights are protected. *Id.* at ___.

CHAPTER 22

Family Division Records

22.2 Records of Family Division

Insert the following language after the last paragraph on page 22-1:

In *In re Lapeer County Clerk*, ___ Mich ___, ___ (2003), the Lapeer County Clerk filed a complaint requesting superintending control based upon a Lapeer Circuit Court Local Administrative Order that assigned duties of the county clerk to the staff of the Family Division of the Circuit Court. The Michigan Supreme Court dismissed the complaint for superintending control but, under its authority to prescribe rules of practice and procedure, provided guidance for courts in crafting future administrative orders.

The Michigan Supreme Court found that the clerk of the court *must* have care and custody of the court records and must perform ministerial duties that are noncustodial as required by the court. In regards to the clerk's custodial duties, the Michigan Supreme Court stated:

> "[W]e conclude that the clerk has a constitutional obligation to have the care and custody of the circuit court's records and that the circuit court may not abrogate this authority. See *In the Matter of Head Notes to the Opinions of the Supreme Court*, 43 Mich 640, 643; 8 NW 552 (1880) ('the essential duties [of a constitutional officer] cannot be taken away, as this in effect would result in the abolishment of the office . . .').
>
> * * *
>
> The circuit court clerk's role of having the care and custody of the records must not be confused with *ownership* of the records. As custodian, the circuit court clerk takes care of the records for the circuit court, which owns the records. Nothing in the constitutional custodial function gives the circuit court clerk independent ownership authority over court records. Accordingly, the clerk must make those records available to their owner, the circuit court. The clerk is also obligated to make the records available to members of the public when appropriate." *Lapeer County Clerk, supra* at ___. (Emphasis in original.)

The Court stated the following in regards to the noncustodial ministerial function of the clerk:

> "[W]e hold that prescribing the exact nature of a clerk's noncustodial ministerial functions is a matter of practice and procedure in the administration of the courts. Accordingly, the

authority to prescribe the specific noncustodial ministerial duties of the clerk of the circuit court lies exclusively with the Supreme Court under Const 1963, art 6, §5.

As such, the judiciary is vested with the constitutional authority to direct the circuit court clerk to perform noncustodial ministerial duties pertaining to court administration as the Court sees fit. This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties." *Lapeer County Clerk, supra* at ___.

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Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 9

Double Jeopardy in Controlled Substances Cases

9.5 A Controlled Substance Conviction or Acquittal in Another Jurisdiction Prevents Retrial for the Same Offense in Michigan

Add the following case summary as the second bulleted item on page 191:

In *People v Zubke*, ___ Mich ___, ___ (2003), the Michigan Supreme Court ruled that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug-conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied. Referring to the dictionary definition of "act," the Court reasoned that the state's prosecution would be barred if the "thing done" or "deed" giving rise to the federal conviction was the same "thing done" or "deed" on which the state charge was based. *Zubke*, *supra* at ___.

The Court concluded that the "thing done" for federal purposes was the conspiracy itself, the defendant's agreement with others to possess and distribute cocaine. *Zubke*, *supra* at ___. For state purposes, however, the "thing done" was the defendant's actual physical possession or control of cocaine. Ruling there was no double jeopardy violation, the Court stated simply:

> "[T]he act of possessing is not subsumed within the act of conspiracy, nor is the act of conspiring subsumed within the act of possessing." *Zubke*, *supra* at ___ n 5.

The Michigan Supreme Court also overruled *People v Avila (On Remand),* 229 Mich App 247 (1998), which held that MCL 333.7409 precluded successive prosecutions when the offenses "*arose out of* the same acts." *Zubke, supra* at ___, quoting *Avila, supra* at 251 (emphasis added).

August 2003

Update: Crime Victim Rights Manual

CHAPTER 9

Victim Impact Statements & Other Post-Disposition Procedures

9.2 Using Victim Impact Statements at Sentencing or Disposition

B. At Sentencing or Disposition Hearings

On page 200, add the following language to the paragraph beginning with "The court must give . . .":

The court rule specifically addressing juvenile sentencing or dispositional hearings in designated cases was amended to require the court to provide victims with "an opportunity to advise the court of any circumstances they believe the court should consider in deciding whether to enter an order of disposition or to impose or delay imposition of sentence." MCR 3.955(A); *People v Petty*, ___ Mich ___, ___ n 9 (2003).

August 2003

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

6.21 Motion to Compel Discovery

2. Information or Evidence That Must Be Disclosed by the Prosecuting Attorney

Insert the following case summary on page 44 before the beginning of subsection 3:

A defendant argued that the prosecution's failure to disclose a corrections officer's memorandum indicating that the defendant possessed a deadly weapon and had recently threatened to kill a specific inmate constituted a *Brady* violation sufficient to undermine confidence in his conviction of purposely causing a corrections officer's death by "prior calculation and design." *Zuern v Tate*, ___ F3d ___, ___ (CA 6, 2003). In *Zuern*, the defendant asserted that the content of the memorandum supported his argument that he planned to kill a fellow *inmate*, not a corrections officer, so that the "prior calculation and design" element did not apply to the defendant's instantaneous assault on the corrections officer. *Zuern*, *supra* at ___.

The Sixth Circuit ruled that the defendant failed to establish a reasonable probability that the outcome of his trial would have been different if the prosecution *had* provided him with a copy of the officer's memorandum:

> "We find that even assuming the memorandum would have helped [the defendant] prove that he planned to kill [another inmate], nevertheless he would have been found guilty because the jury would still have found that he had planned to kill a corrections officer.
>
> "After hearing evidence of [the defendant's] deliberate and prolonged creation of a murder weapon, the jury certainly could find that [the defendant] acted with prior calculation and design to kill someone. . . . [E]ven if [the defendant] had used the memo to persuade the jury that he planned to kill [the inmate], we do not believe there is a reasonable

probability that the jury would have found that [the defendant] had not planned to kill a corrections officer." *Zuern*, *supra* at ___.

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

5. Michigan's "Separate Sovereign" Rules

Add the following text to the end of subsection 5 on page 55:

In *People v Zubke*, ___ Mich ___, ___ (2003), the Michigan Supreme Court ruled that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug-conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied. Referring to the dictionary definition of "act," the Court reasoned that the state's prosecution would be barred if the "thing done" or "deed" giving rise to the federal conviction was the same "thing done" or "deed" on which the state charge was based. *Zubke*, *supra* at ___.

The Court concluded that the "thing done" for federal purposes was the conspiracy itself, the defendant's agreement with others to possess and distribute cocaine. *Zubke*, *supra* at ___. For state purposes, however, the "thing done" was the defendant's actual physical possession or control of cocaine. Ruling there was no double jeopardy violation, the Court stated simply:

> "[T]he act of possessing is not subsumed within the act of conspiracy, nor is the act of conspiring subsumed within the act of possessing." *Zubke*, *supra* at ___ n 5.

The Michigan Supreme Court also overruled *People v Avila (On Remand),* 229 Mich App 247 (1998), which held that MCL 333.7409 precluded successive prosecutions when the offenses "*arose out of* the same acts." *Zubke, supra* at ___, quoting *Avila, supra* at 251 (emphasis added).

6.40 Motion in Limine—Evidence of Other Crimes, Wrongs, or Acts

Insert the following language on page 97 immediately before the beginning of Section 6.41:

The trial court did not abuse its discretion by admitting evidence against the defendant of his consensual relationships with two young women other than the complainants, as well as evidence of the defendant's indecent exposure convictions returned by the jury at the defendant's first trial. *People v Ackerman*, ___ Mich App ___, ___ (2003).

In *Ackerman*, the defendant was the mayor of Port Huron and served as a supervisor at a community youth center during the time of his misconduct. Several young females testified that the defendant allowed his pants to fall down to expose his genitals to the girls when they were at the youth center. The trial court permitted the evidence because it was relevant to the defendant's plan, scheme, and system of introducing young females to his sexual misconduct, and the court determined that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. The Court of Appeals affirmed the trial court's admission of this other-acts evidence and agreed it was offered for the proper purpose of "show[ing] defendant's system of selecting, desensitizing and seducing victims." *Ackerman*, *supra* at ___.

August 2003

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 6

Notice and Time Requirements in Delinquency Proceedings

6.2 Definitions of Parent, Guardian, and Legal Custodian

Replace the discussion of the *CAW* case on pages 116–17 with the following:

In *In re CAW,* ___ Mich ___ (2003), the Michigan Supreme Court reversed the Court of Appeals' decision that a putative father has standing to intervene in a child protective proceeding under the Juvenile Code where the child involved has a legal father. *In re CAW* involved a married couple, Deborah Weber and Robert Rivard, and their children. In July 1998, a petition alleging abuse and neglect was filed pursuant to MCL 712A.2(b). The petition stated that Rivard was the legal father of the children but might not be the biological father of "any or all of the children." The petition also indicated that Larry Heier was the biological father of one of Weber and Rivard's children, CAW. The trial court published a notice of hearing to Heier, but he did not attend any hearings. Later Rivard and Weber indicated that Rivard was the father of all of the children. The trial court then deleted all references to Heier contained in the petition. In November 2000, Weber and Rivard's parental rights to CAW were terminated. Heier then filed a motion in the trial court seeking to intervene in the child protective proceedings. Heier alleged that he was the biological father and had standing on that basis. The lower court denied Heier's motion. *CAW, supra* at ___. The Court of Appeals reversed.

The Supreme Court held that Heier did not have standing to intervene in the child protective proceedings. *Id.* at ___. The Court indicated that intervention in such a proceeding is controlled by MCR 5.921(D),* which provided, in part, that a putative father is entitled to participate only "[i]f, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4). . . ." MCR 5.903(A)(4) defined a "father" as "a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock . . . ." MCR 5.903(A)(1) defined a "child born out of wedlock" as a child conceived and born to a woman who is unmarried from

*MCR 5.921 was amended on May 1, 2003. See MCR 3.921(C).

the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of the marriage. Because Weber and Rivard were married during the gestation period, CAW was not "born out of wedlock." No finding had ever been made that CAW was not the issue of the marriage, and the termination of Rivard's parental rights was not a determination that CAW was not the issue of the marriage. Therefore, the requirements of MCR 5.903 were not met, and Heier did not have standing. *CAW, supra* at ___.

CHAPTER 19

Designated Case Proceedings—Sentencing & Dispositional Options

19.2 Factors to Determine Whether to Impose a Juvenile Disposition or Adult Sentence

Replace the last paragraph in Section 19.2 with the following language:

MCL 712A.18(1)(n) requires the court to consider the factors listed in that statute when deciding whether to impose a juvenile disposition, impose an adult sentence, or delay imposition of sentence; the court need not, however, make findings on each of the statutory factors. In *People v Petty*, ___ Mich ___, ___ (2003), the Michigan Supreme Court overruled *People v Thenghkam*, 240 Mich App 29 (2000) to the extent that it required a trial court to provide a recitation of each of the factors contained in MCL 712A.18(1)(n). The Court stated as follows:

> "Instead of concentrating primarily on the sufficiency of the trial court's factual determinations vis-a-vis the criteria listed in MCL 712A.18(1)(n)(i)-(vi), a plain reading of the statute requires that a court deliberately consider whether to enter an order of disposition, impose a delayed sentence, or impose an adult sentence in light of the six factors enumerated in [MCL 712A.18(1)](n)(i)-(vi). As evidence that it complied with the statute, the trial court, on the record, must acknowledge its discretion to choose among the three alternatives. Hence, a court should consider the enunciated factors, MCL 712A.18(1)(n)(i) through (vi), to assist it in choosing one option over the others. A trial court need not engage in a lengthy 'laundry list' recitation of the factors. Rather, the focus of the hearing should be on the three options, i.e., an adult sentence, a blended sentence, or a juvenile disposition, as outlined in the recently adopted court rules.[6] For this reason, we repudiate the Court's reasoning in *Thenghkam* to the extent it conflicts with this explicit three-part inquiry.
>
> As a result, trial courts will no longer be forced to undertake a mechanical recitation of the statutory criteria. Rather, a court must logically articulate on the record why it has chosen one alternative over the other two, in light of the criteria articulated in MCL 712A.18(1)(n). By so doing, a court performs the analysis required by the Legislature, while establishing an adequate record to permit appellate review."

"[6] See MCR 3.955 specifically addressing these three options."

Petty, supra at ___.

CHAPTER 19

Designated Case Proceedings—Sentencing & Dispositional Options

19.3 Hearing Procedures

Insert the following language on p 425 as the first full paragraph on that page:

Allocution. In *People v Petty*, ___ Mich ___, ___ (2003), the Michigan Supreme Court held that a juvenile defendant tried in a criminal proceeding has a right to allocute prior to sentencing. In *Petty,* the court imposed an adult sentence without providing the defendant with the opportunity for allocution. The Michigan Supreme Court stated:

> "To deny a juvenile a meaningful opportunity to allocute at the only discretionary stage of a combined dispositional and sentencing proceeding would seriously affect the fairness and integrity of the judicial proceeding, particularly when the juvenile is subject to an adult criminal proceeding." *Petty, supra* at ___.

The Court remanded the case to the trial court with instructions for the trial court to allow the defendant the opportunity to allocute before imposing a sentence.

Based upon the Court's findings in *Petty, supra,* MCR 3.955(A) has been amended. Effective July 14, 2003, Administrative Order 2003-39 amends MCR 3.955(A) to require the court to provide an opportunity for the defendant, the defendant's attorney, the prosecutor, and the victim to advise the court prior to disposition or sentencing. The following language was added to MCR 3.955(A):

> "The court also shall give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in deciding whether to enter an order of disposition or to impose or delay imposition of sentence."

CHAPTER 24

Appeals

24.8 Standards of Review

D. "Automatic Waiver" Proceedings

Insert the following language on p 483 following the first full paragraph:

In *People v Petty*, ___ Mich ___, ___ (2003), the Michigan Supreme Court overruled *People v Thenghkam*, 240 Mich App 29 (2000) to the extent that it required a trial court to provide a recitation of all of the statutory factors when making a decision regarding the sentencing of a juvenile. The Court stated as follows:

> "[A] plain reading of the statute requires that a court deliberately consider whether to enter an order of disposition, impose a delayed sentence, or impose an adult sentence in light of the six factors enumerated in [MCL 712A.18(1)](n)(i)-(vi). As evidence that it complied with the statute, the trial court, on the record, must acknowledge its discretion to choose among the three alternatives. Hence, a court should consider the enunciated factors, MCL 712A.18(1)(n)(i) through (vi), to assist it in choosing one option over the others. A trial court need not engage in a lengthy 'laundry list' recitation of the factors. Rather, the focus of the hearing should be on the three options, i.e., an adult sentence, a blended sentence, or a juvenile disposition, as outlined in the recently adopted court rules.
>
> * * *
>
> [T]rial courts will no longer be forced to undertake a mechanical recitation of the statutory criteria. Rather, a court must logically articulate on the record why it has chosen one alternative over the other two, in light of the criteria articulated in MCL 712A.18(1)(n). By so doing, a court performs the analysis required by the Legislature, while establishing an adequate record to permit appellate review." (Footnotes omitted.) *Petty, supra* at ___.

CHAPTER 24

Appeals

24.10 Appointment of Appellate Counsel

Replace the last paragraph on p 486 with the following information:

The Michigan Supreme Court has held that indigent criminal defendants do not have a federal or state constitutional right to appointed counsel to assist them in filing an application for leave to appeal. *People v Bulger,* 462 Mich 495 (2000). The U. S. Supreme Court denied certiorari in *Bulger. Bulger v Michigan,* 531 US 994 (2000). In *Tesmer v Granholm,* ___ F3d ___, ___ (2003), the U.S. Court of Appeals for the Sixth Circuit held that indigent criminal defendants are entitled to appointed counsel in their first appeal, even if the appeal is discretionary. In *Tesmer* the Court reviewed MCL 770.3a, which provides that a defendant who pleads guilty or nolo contendere is not entitled to have counsel appointed for review of the defendant's conviction or sentence except in limited circumstances. The Sixth Circuit Court of Appeals stated:

> "Michigan's statute creates unequal access even to the first part of the appellate system. Though the judge-appellants argue that any distinctions in Michigan's appellate system stem from the fact the indigent pleads guilty, or that the appeal is merely discretionary, the effect is to create a different opportunity for access to the appellate system based upon indigency. As applied, the statute violates the due process provision of the Fourteenth Amendment to the United States Constitution, and is thus unconstitutional." *Tesmer, supra* at ___.

CHAPTER 25

Recordkeeping and Reporting Requirements

25.1 Family Division Records

Insert the following language on p 490 immediately before Section 25.2:

In *In re Lapeer County Clerk*, ___ Mich ___, ___ (2003), the Lapeer County Clerk filed a complaint requesting superintending control based upon a Lapeer Circuit Court Local Administrative Order that assigned duties of the county clerk to the staff of the Family Division of the Circuit Court. The Michigan Supreme Court dismissed the complaint for superintending control but, under its authority to prescribe rules of practice and procedure, provided guidance for courts in crafting future administrative orders.

The Michigan Supreme Court found that the clerk of the court must have care and custody of the court records and must perform ministerial duties that are noncustodial as required by the court. In regards to the clerk's custodial duties, the Michigan Supreme Court stated:

> "[W]e conclude that the clerk has a constitutional obligation to have the care and custody of the circuit court's records and that the circuit court may not abrogate this authority. See *In the Matter of Head Notes to the Opinions of the Supreme Court*, 43 Mich 640, 643; 8 NW 552 (1880) ('the essential duties [of a constitutional officer] cannot be taken away, as this in effect would result in the abolishment of the office . . .').
>
> * * *
>
> The circuit court clerk's role of having the care and custody of the records must not be confused with *ownership* of the records. As custodian, the circuit court clerk takes care of the records for the circuit court, which owns the records. Nothing in the constitutional custodial function gives the circuit court clerk independent ownership authority over court records. Accordingly, the clerk must make those records available to their owner, the circuit court. The clerk is also obligated to make the records available to members of the public when appropriate." *Lapeer, supra* at ___ (emphasis in original).

The Court stated the following in regards to the noncustodial ministerial function of the clerk:

> "[W]e hold that prescribing the exact nature of a clerk's noncustodial ministerial functions is a matter of practice and procedure in the administration of the courts. Accordingly, the

authority to prescribe the specific noncustodial ministerial duties of the clerk of the circuit court lies exclusively with the Supreme Court under Const 1963, art 6, §5.

As such, the judiciary is vested with the constitutional authority to direct the circuit court clerk to perform noncustodial ministerial duties pertaining to court administration as the Court sees fit. This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties." *Lapeer, supra* at ___.

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Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.9 Crime Against Nature (Sodomy/Bestiality)

A. Statutory Authority

1. Sodomy

Insert the following language at the top of page 142 immediately before the section addressing bestiality:

It is unlikely Michigan's sodomy law would withstand a substantive due process challenge to its constitutionality following the United States Supreme Court's decision in *Lawrence v Texas*, 539 US ___ (2003). The Court struck down a Texas statute prohibiting "deviate sexual conduct" between members of the same sex. 539 US at ___. In doing so, the Court reviewed and rejected its decision in *Bowers v Hardwick*, 478 US 186 (1986), in which the majority upheld the constitutionality of a Georgia statute similar to Michigan's statute. 539 US at ___.

At the time *Bowers* was decided, Georgia law, like Michigan's current statute, prohibited sodomy between same-sex *and* different-sex couples. The Texas law at issue in *Lawrence*, however, prohibited only members of the same sex from engaging in "deviate sexual conduct." The Court in *Lawrence* prefaced its decision to overrule *Bowers* by stating that the laws at issue in both cases do more than prohibit a particular sexual act:

> "The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes seek to control a personal relationship that, whether or not entitled

> to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> * * *
>
> "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." 539 US at ___.

After conducting a comprehensive examination of relevant case law and treatises, the Court observed that a decision in *Lawrence* based on Equal Protection could be relatively ineffective. The Court reasoned that its decision in *Bowers* left open the possibility that Texas lawmakers would simply rephrase the prohibition against "deviate sexual conduct" to include such conduct between different-sex participants. The Court preempted this result by overruling *Bowers*:

> "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 539 US at ___.

CHAPTER 7
General Evidence

7.3 Evidence of Other Crimes, Wrongs, or Acts

Insert the following case summary at the top of page 341 before the bulleted paragraph discussing *People v Layher*:

The trial court did not abuse its discretion by admitting evidence against the defendant of his consensual relationships with two young women other than the complainants, as well as evidence of the defendant's indecent exposure convictions returned by the jury at the defendant's first trial. *People v Ackerman*, ___ Mich App ___, ___ (2003).

In *Ackerman*, the defendant was the mayor of Port Huron and served as a supervisor at a community youth center during the time of his misconduct. Several young females testified that the defendant allowed his pants to fall down to expose his genitals to the girls when they were at the youth center. The trial court permitted the evidence because it was relevant to the defendant's plan, scheme, and system of introducing young females to his sexual misconduct, and the court determined that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. The Court of Appeals affirmed the trial court's admission of this other-acts evidence and agreed it was offered for the proper purpose of "show[ing] defendant's system of selecting, desensitizing and seducing victims." *Ackerman*, *supra* at ___.

CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

C. Expert Testimony on "Rape Trauma" and the Emotional and Psychological Makeup of Victims and Defendants

2. Expert Testimony Regarding Defendant Behaviors

Insert the following text at the top of page 411:

Where the evidence showed that the defendant routinely engaged in improper conduct in the presence of young females, the trial court properly admitted expert testimony regarding patterns of behavior used by adult sex offenders to desensitize their child victims. *People v Ackerman*, ___ Mich App ___, ___ (2003). In *Ackerman*, the expert witness was a psychotherapist with a master's degree in clinical social work who specialized in sexual abuse and trauma. Significantly, the majority of the expert's work focused on offenders rather than victims.

The expert witness testified about the "molestation scenario" employed by adult offenders to desensitize child victims to inappropriate sexual conduct. The "molestation scenario" develops and unfolds over time during which the victim becomes familiar with the offender and the offender becomes confident that the victim will not disclose the abuse. According to the witness, the scenarios often begin with rather innocuous acts aimed at giving the child victim the sense that the victim's interactions with the offender represent acceptable behavior. *Ackerman*, *supra* at ___.

The defendant argued that expert testimony about *offenders'* conduct was not permitted under *People v Peterson*, 450 Mich 349, modified 450 Mich 1212 (1995). The defendant claimed that *Peterson* only permitted an expert to testify about behaviors typically exhibited by *victims* of child sexual abuse, and that this limited expert testimony was necessary because some victim behavior appears inconsistent with having been abused. *Ackerman*, *supra* at ___.

The Court of Appeals affirmed the trial court's ruling allowing the expert testimony, noting that the defendant's reliance on *Peterson* was misplaced:

> "The *Peterson* Court simply did not address admissibility of expert testimony concerning typical patterns of behaviors by adults who perpetrate child sexual abuse." *Ackerman*, *supra* at ___.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.4 The Sentencing Hearing

B. Defendant's Right of Allocution

Insert the following paragraph on page 450 before the paragraph beginning with "A court may, in its discretion . . .":

The Michigan Supreme Court recognized the historic underpinnings of allocution and reaffirmed the fundamental importance of affording a defendant the opportunity to allocute before he or she is sentenced in *People v Petty*, 469 Mich ___, ___ (2003). *Petty* involved a juvenile convicted and sentenced as an adult in designated case proceedings. The trial court did not allow the juvenile defendant an opportunity to speak before imposing sentence. The Michigan Supreme Court reaffirmed its statement in *People v Petit,* 466 Mich 624, 629 n 3 (2002), that although MCR 6.425(D)(2)(c) does not require a court to specifically ask a defendant whether he or she wishes to speak, the better practice is to do so.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.6 Post-Conviction Request for DNA Testing

Insert the following case summary after the first paragraph on page 472:

The Michigan Supreme Court granted the prosecutor's leave to appeal from the Court of Appeals' decision granting the defendant a new trial based on newly discovered evidence—a third party's confession to the crime for which the defendant was convicted. *People v Cress*, 467 Mich 889 (2002). The Michigan Supreme Court agreed with the trial court: the third party was not credible and his confession was likely false. *People v Cress*, ___ Mich ___, ___ (2003).

Citing to a pair of 1928 cases, the Court noted that "[a] false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Cress*, *supra* at ___, citing *People v Simon*, 243 Mich 489, 494 (1928); *People v Czarnecki*, 241 Mich 696, 699 (1928). Because the Court of Appeals erred in substituting its judgment for that of the trial judge with regard to the confessor's credibility, the Supreme Court reinstated the trial court's denial of the defendant's motion for a new trial.

Add the following language to the cross-reference (indicated with *) at the top of page 472:

On remand, the circuit court found no evidence that the prosecutor's office acted in bad faith in destroying the evidence. *People v Cress*, ___ Mich ___, ___ n 4 (2003).

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CHAPTER 2

Civil Infractions

2.8 Speed Violations

B. Absolute Speed Laws

On page 2-28, replace the language after the third bullet with the following:

- 70 mph—Effective July 22, 2003, the maximum speed limit on all freeways was increased to 70 mph. MCL 257.628(9). Notwithstanding the speed increase, the amended statute permits the state transportation department to designate up to 170 miles of freeway on which the speed limit may be lower than 70 mph. *Id*. MCL 257.628(9) establishes the minimum speed on all freeways at 45 mph, unless otherwise posted or made necessary for safe operation.

CHAPTER 3

Misdemeanor Traffic Offenses

3.10 Failing to Give Information and Aid at the Scene of an Accident

E. Issues

Insert the following language before Section 3.11 on page 3-9:

A defendant's Fifth Amendment right against self-incrimination is not implicated by requiring the defendant to comply with a statutory mandate to stop and disclose neutral information at the scene of a serious accident. *People v Goodin*, ___ Mich App ___, ___ (2003). MCL 257.617 requires a driver who was involved in an accident resulting in serious injury to stop at the scene of the accident and fulfill the disclosure requirements of MCL 257.619. In *Goodin*, the defendant argued that he would have been forced to incriminate himself by admitting he was involved in the collision if he had complied with the statutory scheme of stopping at the scene and disclosing information. *Goodin*, *supra* at ___.

The Court disagreed with the defendant and held that the disclosures required of drivers involved in serious accidents are neutral, have no criminal implications, and do not create a significant risk of self-incrimination. *Goodin*, *supra* at ___.

CHAPTER 3

Misdemeanor Traffic Offenses

3.14 Leaving the Scene of an Accident Resulting in Personal Injury

E. Issues

Insert the following language after the last paragraph on page 3-15:

A defendant's Fifth Amendment right against self-incrimination is not implicated by requiring the defendant to comply with a statutory mandate to stop and disclose neutral information at the scene of a serious accident. *People v Goodin*, ___ Mich App ___, ___ (2003). MCL 257.617 requires a driver who was involved in an accident resulting in serious injury to stop at the scene of the accident and fulfill the disclosure requirements of MCL 257.619. In *Goodin*, the defendant argued that he would have been forced to incriminate himself by admitting he was involved in the collision if he had complied with the statutory scheme of stopping at the scene and disclosing information. *Goodin*, *supra* at ___.

The Court disagreed with the defendant and held that the disclosures required of drivers involved in serious accidents are neutral, have no criminal implications, and do not create a significant risk of self-incrimination. *Goodin*, *supra* at ___.

CHAPTER 3

Misdemeanor Traffic Offenses

3.29 Invalid or No Registration Plate

A. Applicable Statute

On page 3-33, replace the language in paragraph (2) of the applicable statute with the following:

"(2) . . . [A] person who violates subsection (1) is responsible for a civil infraction.* However, if the vehicle is a commercial vehicle which is required to be registered according to the schedule of elected gross vehicle weights under section 801(1)(k), the person is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both."

*MCL 257.255 was amended by 9 PA 2003, effective September 1, 2003. Before the amendment, a person who violated subsection (1) was guilty of a misdemeanor punishable by not more than 90 days in jail, not more than a $100 fine, or both.

C. Criminal Penalties

Replace the language in subsection C on page 3-34 with the following:

A violation of MCL 257.255(2) is:

- a civil infraction for noncommercial vehicles, and
- a misdemeanor for specified commercial vehicles, punishable by not more than 90 days imprisonment or a fine of not more than $500, or both.*

*Amended by 9 PA 2003, effective September 1, 2003.

CHAPTER 5
Snowmobiles

5.2 Definitions in Snowmobile Act

Add the following language to the bottom of page 5-3:

Effective July 14, 2003, the definition of "peace officer" was added to the list of terms defined in the Snowmobile Act. MCL 324.82101(k) states:

> "(k) 'Peace officer' means any of the following:
>
> (i) A sheriff.
>
> (ii) A sheriff's deputy.
>
> (iii) A deputy who is authorized by a sheriff to enforce this part and who has satisfactorily completed at least 40 hours of law enforcement training, including training specific to this part.
>
> (iv) A village or township marshal.
>
> (v) An officer of the police department of any municipality.
>
> (vi) An officer of the Michigan state police.
>
> (vii) The director and conservation officers employed by the department.
>
> (viii) A law enforcement officer who is certified pursuant to the commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.616, as long as that officer is policing within his or her jurisdiction."

August 2003

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CHAPTER 7

Felony Offenses in the Michigan Vehicle Code

7.8 Leaving the Scene of an Accident Resulting in Serious or Aggravated Personal Injury or Death

E. Issues

Insert the following case summary on page 7-19 as the next-to-last paragraph in subsection E:

A defendant's Fifth Amendment right against self-incrimination is not implicated by requiring the defendant to comply with a statutory mandate to stop and disclose neutral information at the scene of a serious accident. *People v Goodin*, ___ Mich App ___, ___ (2003). Accordingly, the defendant's constitutional rights were not violated when he was charged with failure to stop at the scene of an accident *and* negligent homicide.

MCL 257.617 requires a driver who was involved in an accident resulting in serious injury to stop at the scene of the accident and fulfill the disclosure requirements of MCL 257.619. The defendant argued "that had he stopped and given the required information, he would have incriminated himself for negligent homicide by admitting he was at the scene and involved in the events leading up to the accident." *Goodin*, *supra* at ___.

The Court disagreed with the defendant and held that the disclosures required of drivers involved in serious accidents do not create a significant risk of self-incrimination. According to the *Goodin* Court:

> "[T]he disclosures of one's name, address, vehicle registration number, and driver's license required by MCL 257.617 and MCL 257.619 are neutral and do not implicate a driver in criminal conduct. Moreover, MCL 257.617 is not directed at a 'highly selective group' or a group 'inherently suspect of criminal activities,' but rather is

aimed at any driver involved in an accident that results in serious personal injuries or death." *Goodin*, *supra* at ___, citing *California v Byers*, 402 US 424 (1971).